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REGIONAL ACTIVITY TO PROMOTE INTEGRATION THROUGH DIALOGUE AND POLICY IMPLEMENTATION IN SADC

Combating Corruption in Swaziland:

An assessment of the efficacy of proposed anti-corruption measures in the Kingdom of Swaziland

A report prepared by

The Institute for Security Studies (ISS)

Organised Crime & Corruption Programme

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

The purpose of this Report is to assess the efficacy of anti-corruption measures proposed by the Government of the Kingdom of Swaziland (GOKS) in the first quarter of 2005. These measures are crystallised in the Prevention of Corruption Bill 2005. The Report is a result of a study commissioned by RAPID on the request of the USAID. The study was facilitated by the Office of the Prime Minister of the GOKS, His Excellency Absalom T Dlamini. The study relied on desktop and field research. An important part of the research comprised interviews with high level government officials, business representatives, civil society organisations and the media in Swaziland.

The Report sketches the background to the assessment, and the factors to which particular attention was paid, as well as the research methodology used. Proposed anti-corruption measures are evaluated against the background of the prevailing political and socio-economic environment. The Report presents a brief overview of the challenges arising from corruption in Swaziland and sets out the official responses to corruption to date. This includes the procedural structures that are contained in the draft Prevention of Corruption Bill, which are in turn evaluated against the relevant regional and international instruments. Furthermore, the substantive offence provisions in the Bill are evaluated.

The study found that:

1. Corruption has a large impact on Swaziland, especially in terms of its impact on poverty levels. Corruption in procurement, which specifically manifests itself in the form of price inflation and collusion between domestic or foreign companies and local officials, is of particular concern. No national Anti-Corruption strategy exists at present.
2. A lack of adherence to the rule of law, and the absence of a culture of democratic constitutionalism, as imbued in the separation of powers and the respect for judicial authority, impede the effective implementation of anti-corruption measures.
3. The Anti-Corruption Commission has been dysfunctional for the past two years, and lacks credibility. The issue became a priority for the new government in April/May 2004. The premises it currently occupies are rented and in a state of severe disrepair.

4. The Prevention of Corruption Bill covers most forms of corruption prevalent in Swaziland. It appears to be based on regional good practice.
5. It is evident that key office-holders such as the office of the Prime Minister and Minister of Justice recognise the threat of corruption, and are prepared to confront it.
6. An atmosphere of fear continues to permeate society, which might impede the flow of information to the Anti-Corruption Commission.
7. Informants and the media are potential sources of tip-offs for the Anti-Corruption Commission.
8. There is support for the appointment of the head of the Anti-Corruption Commission and his or her deputy for a renewable term of office of 5-7 years.
9. There appears to be little faith in the portfolio committee system as it is seen as ineffective. Part of the reason appears to be that the tenure of portfolio committee members is too short, and the turnover too high to permit sustainable capacity building.
10. The salaries of members of the Anti-Corruption Commission are linked to public service scales. This makes it difficult for the Commission to attract and retain skilled staff.
11. A good framework for the detection of unexplained wealth is provided by the Public Sector Regulations (1978). Under it, Ministers, Members of Parliament, Principal Secretaries; Heads of Department, Chief Executive Officers of Parastatals are required to declare assets and liabilities annually. There is a perception that the regulations are not being enforced.
12. Cases of corruption and white collar crime tend to be crowded out by other cases. There are no courts dedicated to determining corruption cases.
13. The effectiveness of the Auditor General's office is hampered by the lack of institutional autonomy.

The study accordingly makes the following recommendations:

A. In general:

1. The political will and commitment to combating corruption should be reflected at all levels to ensure a sustained and comprehensive response to corruption.

2. Immunity from prosecution for corrupt practices should not be allowed at any level. The law against corruption must be equally applied and enforced across the board.
3. The Constitution should guarantee the rule of law, and support a culture of democratic constitutionalism, as imbued in the separation of powers and the respect for judicial authority

B. To the government of the Kingdom of Swaziland:

1. Swaziland should formulate a national anti-corruption strategy, co-ordinated by government and involving all stakeholders, as a matter of urgency. The strategy should be comprehensive enough to deal with corruption in the public and private sector.
2. The Prevention of Corruption Bill should be harmonised with the Draft Constitution. In particular, the powers and functions of the proposed Commission *on Human Rights & Public Administration* should be harmonised with those of the Anti-Corruption Commission to avoid duplication of activities. The *Commission on Human Rights & Public Administration* needs to also identify priority areas for engagement by the Anti-Corruption Commission.
3. There should be comprehensive procurement reform across all sectors within the public service. This should be publicised to the general public and the private sector.
4. There should be clear co-ordination of activities between the Anti-Corruption Commission and the Police Fraud Department to ensure that there is no overlap in investigating and prosecuting white-collar crime, including corruption.
5. The Anti-Corruption Commission should be able to raise funds through the forfeiture of the proceeds of crime. This should supplement the proposed allocation by Parliament through the Ministry of Justice. The Commission may also need some core funding from abroad during its set-up, i.e. for building, purchase of vehicles, office equipment etc.
6. Training of staff and capacity building are essential. Investigators, prosecutors and the judiciary should be trained on measures to combat corruption – and on all aspects of the new Act to ensure that they can implement its provisions.

7. The salaries of members of the commission should be set separately – and not necessarily linked to public service employee scales. They need to be well paid in order to attract and retain skilled staff who are not vulnerable to corruption.
8. Staff should not be seconded to or from the Commission, as this may inhibit investigators from acting decisively in tricky situations and limit its long-term institutional capacity. The Commission needs to procure its own full-time expertise and can outsource some functions i.e. complex forensic auditing if necessary.
9. The regulations requiring the annual disclosure of assets, interest and liabilities should be reviewed to ensure effective enforcement.
10. Government, in consultation with civil society and the Swazi academic community, should commission regular surveys of the nature and extent of corruption in Swaziland, to facilitate periodical measurement of the impact of the Anti-Corruption Commission.
11. The Auditor General's office should be strengthened and guaranteed independence in terms of the Constitution. It should be accountable to Parliament.
12. Legislation on access to information as well as legal guarantees on the protection of whistle blowers must be instituted as a matter of priority.
13. The current Anti-Corruption Commission should be formally dissolved. It should be reconstituted. The ACC should be housed in its own building, preferably not in close proximity to other government institutions. The Anti-Corruption Commission should be adequately resourced.
14. Government should institute public sector reform measures to rationalize processes and procedures, and to restructure organizational work and methods.

C. To Parliament:

1. Legislation on access to information as well as legal guarantees on the protection of whistle blowers must be instituted as a matter of priority.
2. The role of the media in investigating and reporting on corruption needs to be recognised by law and effectively protected by the Constitution.
3. The powers for appointment and removal of the Anti-Corruption Commissioner should exclusively be vested with Parliament, and the extension of veto powers to the King with regard to the tenure of the Commissioner should be precluded. The same arrangements should be extended to the tenure of the Deputy Commissioner.

4. The Anti-Corruption Commission (ACC) should be accountable and answerable to Parliament in all matters relating to its operations to ensure transparency in the discharge of its mandate.
5. To insulate the tenure of both the Commissioner and the Deputy Commissioner from external interference, the grounds for their appointment and removal must be specified in law. Parliament should be able to remove the Commissioner and the Deputy Commissioner from office only on the grounds of non-performance or clearly defined and relevant 'misbehaviour'. The current provision in the Bill relating to removal for misbehaviour is too broad.
6. The Anti-Corruption Commission should be autonomous; it should not be located within a government ministry. Corruption investigators should be protected by law from victimisation.
7. Capacity should be created within the parliamentary portfolio committee system – to enable parliament to effectively hold the ACC accountable.

D. To the judiciary:

1. There should be specialised courts to deal with corruption cases. Before the establishment of such courts, corruption cases should be dealt with by both the High and Lower courts.

E. To civil society:

1. An annual dialogue (*imbizo*) should be organised between Civil Society and the Anti-Corruption Commission, to facilitate interaction.

AN ASSESSMENT OF THE EFFICACY OF PROPOSED ANTI–CORRUPTION MEASURES IN THE KINGDOM OF SWAZILAND

Chapter 1: Background and Methodology

1.1: Background to the Assessment[1]

1.1.1 Southern Africa has generally experienced positive developments in the democratisation process in the last decade. However, both perceived and experienced levels of corruption are unacceptably high and remain an impediment to sustained economic and human development. Both the regional and international experience has shown that corruption has become more complex and sophisticated, and cannot be adequately addressed through conventional law enforcement agencies such as the police. Hence, a number of Southern African countries, including Swaziland, have decided to design special measures to fight corruption.

1.1.2 As part of its policy response to corruption, the Government of the Kingdom of Swaziland (GOKS) established an anti-corruption commission by enacting the *Prevention of Corruption Order number. 19 of 1993*, which was later amended in 1998. This was a commendable move on the part of the GOKS. However, it is common knowledge that the success rate or effectiveness of anti-corruption commissions has been mixed the world-over. Some jurisdictions such as Hong Kong and Botswana have achieved remarkable success while efforts in other countries have been negatively affected due to a variety of reasons, including but not limited to: an inadequate legal framework; a lack of checks and balances; lack of clarity on criteria for the appointment of the chief officers of the anti-corruption agency; the institutional structure of the commission and its relationship with other governance institutions; inadequacy of the resources allocated to the commission; shortcomings in the anti corruption strategy adopted by the commission; and the absence of a conducive relationship between the commission and the public.

1.1.3 As part of the GOKS stated commitment to enhancing the effectiveness of the anti-corruption commission, in late 2004 the Prime Minister of Swaziland, His Excellency Absalom T. Dlamini requested the United States Embassy in Swaziland to assist in

[1] This is in part based on a draft 'Statement of Work' prepared by RAPID/USAID.

assessing the effectiveness of the anti-corruption commission in the fight against corruption.

1.1.4 To this end RAPID was asked by the USAID - Regional Centre for Southern Africa's (RCSA) Directorate on Governance to engage the services of a team of experts to carryout an assessment of the Swaziland anti-corruption commission and to determine its effectiveness in the fight against corruption. RAPID approached the Institute for Security Studies (ISS)[2] through its Cape Town based Organised Crime and Corruption Programme to undertake the assessment. In agreement with RAPID the services of four experts were engaged. Together they comprised the '*Assessment team*'. They are[3]:

- **Charles Goredema**, Senior Research Fellow, ISS Organised Crime and Corruption Programme.
- **Mukelabai Mukelabai**, Senior Researcher, ISS Organised Crime and Corruption Programme.
- **Prof. Hamilton Sipho Simelane**, Acting Director, Consultancy and Training Centre, University of Swaziland.
- **Hennie van Vuuren**, Senior Researcher, ISS Organised Crime and Corruption Programme.

The *Assessment Team* was requested to compile a report of its findings, with clear recommendations on how the GOKS can address any limitations of the anti-corruption commission (both in law and practice) in terms of both the existing legislative framework (the Prevention of Corruption Order of 1993) and the Draft *Prevention of Corruption Bill* (2005).

1.1.5 The purpose of the assessment is to determine the effectiveness of the anti-corruption commission in the fight against corruption in Swaziland. It was proposed that the

[2] The ISS is applied policy research NGO with which undertakes research on issues related to human security across the African continent. The ISS has offices in South Africa (Pretoria & Cape Town) and Malawi and plans to open offices in Kenya and Ethiopia in the course of 2005.
[3] All four Assessment Team members have extensive research and professional experience in Southern Africa and the team constituted leading experts in the field of anti-corruption, organized crime and money laundering. Two members of the Assessment Team have extensive legal expertise including experience as former Director of Public Prosecutions in Zambia. Detailed resumes are available from RAPID/USAID.

findings of the assessment should enable both the GOKS and potential donors to clearly and readily discern where the limitations are in combating corruption. It was also proposed that the assessment report should make clear and specific recommendations on how the identified limitations can be addressed in order to enhance the effectiveness of the anti-corruption commission proposed in the draft Bill in combating corruption in Swaziland.

1.1.6 The following constitute an illustrative list of areas and/or elements that were required to be assessed:

- The adequacy of existing anti-corruption legislation.
- The adequacy of proposed new anti-corruption legislation.
- An assessment of the adequacy of resource levels allocated to the commission, including financial, human and communication resources.
- An assessment of the 'political will' to fight corruption in Swaziland.
- The institutional structure of the Commission and to what extent the current institutional structure of the Commission facilitates or hinders the effectiveness of the commission.
- The level of autonomy/ independence enjoyed by the anti-corruption commission and how this impacts on its effectiveness and success in carrying out its mandate.
- The process of appointment of the head of the commission, the impact this might have on both the real and perceived independence of the commission as well as the extent to which the appointment procedure hinders or enhances the effectiveness of the commission.
- An assessment of the accountability of the commission as well as the checks and balances that exist to ensure that the commission performs its functions in a transparent and accountable manner. Included in this is the relationship of the commission to other governance structures such as Parliament, the Attorney General, the Director of Public Office Prosecutions, the Minister of Justice, the Police, Civil Society and any other relevant governance structures.

- The Anti-Corruption Strategy the commission has developed to fight corruption and the effectiveness thereof.
- Engagement with the public by the commission and the adequacy of its public outreach strategy.

The services of the *Assessment Team* were engaged for a period of 20 days (from mid May – mid June 2005).

1.2: Research Methods

This study relied on extensive desktop and a certain amount of field research:

1.2.1 Field Research:

The Assessment Team conducted detailed interviews with over twenty individuals from government, the anti-corruption commission, civil society, business and the media from 16-20 May 2005. A list of individuals interviewed is attached as *Annexure A.* In most instances interviewees were extremely helpful and spoke frankly about corruption in Swaziland and the relative effectiveness of the commission to combat it. These interviews also presented the Assessment Team with an opportunity to explore more general themes of the governance framework in Swaziland and how the work of the commission could be made more effective in combating corruption. Reflections from these discussions are listed throughout this study and have been summarised as non-attributed research observations (*See Section 5*).

1.2.2 *Desktop research:*

Extensive desktop research has been undertaken to assess the effectiveness of the *Draft Bill.* This includes:

- An assessment of the current governance framework in Swaziland.
- An assessment of the overall strengths and weaknesses of the *Draft Bill*. This includes an assessment of how it would operate within the context of Swaziland.

- An assessment of how the *Draft Bill* relates to and would be affected by other pieces of existing and impending legislation. An important document in this regard was the *Draft Constitution of the Kingdom of Swaziland* (May 2003).
- An assessment of the extent of compliance by the *Draft Bill* with the *SADC Protocol Against Corruption* (2001), the *African Union Convention on Preventing and Combating Corruption* (2003) and the *United Nations Convention Against Corruption* (2004).

For a full list of documents consulted please refer to the annotated bibliography (attached as *Annex B*).

Potential research limitations

1.2.3 Time was the primary limiting factor. Given the request for a "Rapid Assessment" (and the resultant short timeframe allocated to the research) the assessment may not necessarily be exhaustive. However, the project team is satisfied that they have adequately addressed the key focus areas identified by the GOKS/USAID.

Chapter 2: Governance and Society

2.1 Overview of governance system

2.1.1 The Kingdom of Swaziland is a landlocked country situated between the Republic of South Africa and Mozambique, with an area of 17,363 square kilometres. The official capital city is Mbabane, but the royal and legislative capital is Lobamba. The population of Swaziland is approximately 1,125,000 (2002 estimate).

2.1.2 Swaziland is a monarchy. The King or *Ngwenyama* is the head of state and exercises executive, legislative and judicial powers. He rules in conjunction with the Queen Mother or *Ndlovukazi* (she- elephant). The King is regarded as the mouthpiece of his people and is described as '*Umlomo longacali manga'* (the mouth that tells no lies). Traditional practice demands wide consultation before the King makes major decisions. Swazi custom permits every Swazi to have access to the King. In practice the King's traditional advisers and members of the royal family play a critical role in the consultative process and often act as gatekeepers.

2.1.3 The system of governance in Swaziland has evolved from a long history, dating from pre-colonial times. The General Law and Administration Proclamation (No.4 of 1907) established the Roman-Dutch Common Law, while the Constitutional Law Act (No.50 of 1968) created a Westminster type of administration that provided law courts, a civil service, a bicameral parliament and the cabinet presided over by the Prime Minister. There has thus been an inter-play of the parliamentary system of governance based on the Westminster model and the traditional system that is underpinned by the monarchy. These two systems have shaped the present pattern of national political processes, laws and policies. Consequently, the country has a dual system of governance.

2.1.4 Under the current dual system of governance, the Prime Minister is the head of the Government and is appointed by the King. The Cabinet is comprised of 14 Ministers who are appointed by the Prime Minister subject to confirmation by the King. The executive function is essentially vested in two distinct authorities- the Prime Minister and Cabinet, and the traditional functionaries in the royal palace.

2.1.5 Alongside and intertwined with the conventional modern form of government is a similarly well-established *Tinkhundla* structure of governance reporting directly to the *Ingwenyama*. An *Inkhundla* is a traditional meeting place where matters of local concern are discussed. In modern Swaziland, the *Tinkhundla* have evolved into economic growth points and local government administration centres. Each Inkhundla is made up of about 10 chiefdoms (Imiphakatsi). Currently, there are 55 *Tinkhundla* centres that also double as constituencies for parliamentary elections under the modern system of governance.

2.1.6 When Swaziland attained independence in 1968 it adopted a constitution based on the Westminster parliamentary model, which clearly spelt out the separation of powers between the three arms of government: judiciary, executive and legislature. However, in 1973 King Sobhuza II repealed the 1968 constitution and all the three arms of government were vested in His Majesty. This act had several consequences. The three major ones were:

- Political parties were banned;
- The separation of powers between the three arms of government was compromised; and
- The bill of rights was abrogated.

2.1.7 This development had a serious impact on the nature of governance in Swaziland. It has been argued that the Proclamation resulted in a lack of political participation by the citizens. Since the late 1980s, there have been increasing calls for the repeal of the 1973 Proclamation. King Mswati III responded by establishing several commissions to solicit views from the people and make recommendations. Thus the Political and Economic Review Commission Reports of the 1990s reflected the sentiments of the nation in calling not only for constitutional, but also economic and social review of the country's situation.

2.1.8 Swaziland currently has a bicameral Parliament made up of the House of Assembly and Senate. The House of Assembly has 65 members, 55 of who are elected directly by a secret ballot at the Tinkhundla level and 10 appointed by the King-in-Council. The Senate has 30 members, 10 of whom are elected by the House of Assembly and

20 appointed by the King. The country maintains formal registration of voters aged 18 years and above, and elections are conducted every five years. There are local councils administering the affairs of each *Inkhundla*. Elected City Councils and Town Boards, on the other hand, govern the cities and towns.

2.1.9 Swaziland has a dual legal system. On one hand there is the modern system based mainly on the common law and Dutch legal systems. The highest court under this system is the Court of Appeal. The other courts are the High Court and the Magistrates' Court. The Office of the Director of Public Prosecutions (DPP) occupies a central role in the Swazi 'modern' criminal justice system. All prosecutions before the Court of Appeal, High Court and Magistrates' Courts are conducted by or on behalf of the DPP.

2.1.10 The major challenges in the administration of criminal justice include the issues of security of tenure for judicial officers and the DPP; independent budgets for the Judiciary and the Office of the DPP; lack of specialized training particularly regarding the handling of economic crime including corruption, low levels of remuneration; and caseload management. It is reported that a number of cases have been pending before the courts for more than three years. Most of the pending cases involve economic crimes and corruption.

2.1.11 The second limb of the legal system consists of the traditional system of national courts that follow traditional law and custom. The Chiefs are custodians of Swazi law and custom and are responsible for the day-to-day running of their chiefdom. Chiefs have their own community police who may arrest a suspect and bring him or her before an inner council within the chiefdom for trial.

2.1.12 In practice, the concurrent operations and use of both traditional and modern government and legal systems create overlaps of responsibilities with government officials often having to face challenges arising from the lack of clarity as to which system is in application at any given time. The government recognizes the need to harmonize the two systems not only to streamline its operations, but also to facilitate

good governance. Towards this end, the GOKS has undertaken a "Capacity Strengthening for Good Governance" Programme with the support of the UNDP and a major corporate, Tibiyo Taka Ngwane. The programme is intended to integrate customary and modern laws, formulate a comprehensive programme on governance and provide support to the efforts of government to build a culture of popular participation in public affairs**.**

2.1.13 The issues and activities addressed by these initiatives focus on the codification of customary law and its integration into modern law. Other critical issues cover constitutional reform, public sector management, the role of the government and popular participation in the process of national economic and political transformation.

2.1.14 The Constitutional Review Commission was set up in 1996 to spearhead the process of constitution building. It has completed soliciting public views on various topics relevant for inclusion in the new constitution. A parallel initiative is the codification of Swazi Law and Customs. This is meant to guide the new constitution to reflect cultural sensitivities and to incorporate the relevant customary laws.

2.1.15 It is anticipated that the new constitution will clearly spell out the role of the monarch, review the 1973 Proclamation, include a Bill of Rights and delineate the powers of the executive, legislature and judiciary. There will also be a need to address the minority status of women, as this is currently the situation with both the customary and Roman-Dutch law. These and other concerns are to be addressed through a new Constitution that is being drafted by a Constitution Drafting Committee (CDC). Additionally, a bill on prevention of corruption has been drafted and its enactment in law is hoped to entrench transparency and accountability in the Kingdom of Swaziland.

2.2 Socio – Economic Challenges

2.2.1 The major socio-economic challenges facing government include declining growth in GDP in an environment of increasing poverty and rising unemployment, drought and food insecurity and the worsening impact of the HIV/AIDS pandemic. Swaziland has one of the highest per capita HIV/AIDS rates in the world. Government responses to these challenges include the long-term (25 years) National Development Strategy (NDS) which addresses the problems of low economic growth rates; unemployment; budget deficits; population growth rates; and the general decline in living standards. The Poverty Reduction Strategy and Action Plan (PRSAP), to implement the strategy; and the Public Sector Management Programme (PSMP) that aims to improve the performance, productivity and effectiveness of the public service as well as ensure better allocation of resources, in order to complement the NDS.

2.2.2 The ***Prevention of Corruption Order No. 19 of 1993*** criminalised various forms of corruption as listed in Part III of the Order. Section 20 codified the common law offence of bribery. **Section 21** criminalised corruption in respect of tender processes. The Act also covered bribery in the private sector and judicial authority. Amendments to the ***Prevention of Corruption Order No.19 1993,*** established the Anti-Corruption Commission. Primarily, the Commission was empowered to carry out corruption prevention measures and institute investigations in respect of complaints of alleged or suspected corrupt practices in both the public and private sectors. On completing investigations, cases of corruption would be referred to the Director of Public Prosecutions for possible prosecution.

2.2.3 The Commission was officially launched in February 1998 by the Prime Minister of Swaziland. It received a serious setback in 2002 when the High Court of Swaziland ruled in the case of **Rex vs. Mandla Ablon Dlamini** (Case no. 7/2002) that the ***Prevention of Corruption Order***, as amended was not validly enacted. It consequently did not have legal force. The Commission, however, has not been closed and members of the public still approach it with reports of alleged corruption. These reports are noted in registers and, where necessary, referred to the police or

other relevant Government institutions. Following the court decision the Government of Swaziland decided to enact new legislation to re-establish the Commission and reinstate the anti-corruption provisions of the Order.

2.2.4 The Prime Minister emphatically laid down the position of his government on corruption in his speech to Parliament in September 2004. He also indicated that Government would focus on the private sector as the engine of growth and endeavour to eradicate corruption in the private sector. He remarked:

> *"Government is constantly receiving reports about corruption being on the increase. It appears that current measures to deal with this evil are ineffective. This has to change forthwith and there will be zero tolerance to corruption. Government is committed to fighting corruption at every level, both in the private and the public sectors. Government is currently working on a Bill that will soon be presented to Parliament to replace the Prevention of Corruption Order No: 19 of 1993. The Bill aims to strengthen the Anti-corruption Commission and give the Commission more powers to investigate, prosecute and deal conclusively with corruption and the proceeds thereof confiscated."*[4]

2.2.5 The context in which Swaziland is considering fresh legislation against corruption is different from what it was at the time of advent of the *Prevention of Corruption Order*. Innovations that are intended to take into account best anti-corruption practices have been adopted at sub-regional and international level since 2001. At the international level, three instruments that are relevant to anti-corruption infrastructure have come into being. They are:

- **The SADC Protocol Against Corruption**
- **The United Nations (UN) Convention Against Corruption**
- **The African Union (AU) Convention on Preventing and Combating Corruption.**

[4] See http://www.sarpn.org.za/documents/d0000958/P1075-Swaziland-Policy_Sept2004.pdf.

2.2.6 These instruments contain principles that are generally accepted at the international level as essential for promoting and strengthening the development of mechanisms for preventing and combating corruption. Swaziland is a signatory to the *SADC Protocol Against Corruption* but has not ratified it. The Kingdom has not ratified both the *UN Convention Against Corruption* and the *AU Convention on Preventing and Combating Corruption.*

2.2.7 A bill setting out a legislative framework against corruption has been prepared for presentation to parliament in the near future. This section of the Report assesses the potential of the Prevention of Corruption Bill to enable government to effectively combat corruption. At the same time, the extent of compliance with best practices is also evaluated. The term best practices on combating corruption is used in this report to refer to practices aimed at preventing and suppressing corruption as contained in the *SADC Protocol Against Corruption*, *the UN Convention Against Corruption*, and *the AU Convention on Preventing and Combating Corruption*. Most of the provisions in the three instruments share similar objectives. For the purpose of assessing the extent to which *the Prevention of Corruption Bill, 2005* complies with best anti-corruption practices, this Report elucidates the main provisions of the three international instruments against corruption. Where gaps have been identified, the Report recommends remedial changes. In a sense, the Bill is evaluated at two levels: firstly, on its own terms and secondly, against the best anti-corruption practices.

Chapter 3: Corruption and responses to corruption in Swaziland

3.1 The impact of a global phenomenon

3.1.1 Corruption, defined as the abuse of entrusted power for private benefit, is a phenomenon that is prevalent in the public sector, the private sector and civil society. Corruption is not a victimless crime but negatively affects society as a whole and the poor in particular. While corruption is a feature of all societies to varying degrees, it has a particularly devastating impact on development and good governance in developing countries in Africa. This is because it undermines economic growth, discourages foreign investment and reduces the optimal utilisation of limited resources available for infrastructure, public services and anti-poverty programmes. It also undermines political institutions by weakening the legitimacy and accountability of governments.

According to the Prime Minister of Swaziland H.E.T.Dlamini,

> *"Corruption raises the cost of goods and services, it increases the debt of a country; leads to lowering of standards, as substandard goods are provided and inappropriate or unnecessary technology is acquired; and it results in project choices being made based more on capital than on manpower, which will be more useful for development."*[5]

3.1.2 The consequences and long-term costs of corruption take many different and inter-related forms, including economic, political, social, environmental and cultural impacts. In fragile democracies corruption can seriously threaten the viability of democratic institutions. In a corrupt environment resources will be directed toward non-productive areas such as the police, the armed forces and other organs of social control and repression when the entrenched interests of corrupt groups are threatened.

3.1.3 The monetary cost of corruption to the global economy is estimated by the World Bank Institute (2003) to be in excess of USD$ 1 trillion per annum. When assessing the impact of corruption one can consider the fact that African Union (AU) estimated that Africa lost approximately USD$ 150 billion to corruption in 2002. As a global

[5] See press article in: The *Weekend Observer* , 9-10 April, 2005

phenomenon corrupt activity stretches far beyond the African continent, often involving corrupt corporations exporting corruption to the continent. However, it is imperative that African states develop a comprehensive national policy framework, with the requisite capacity, to tackle the issue. This is evidenced in initiatives such as the African Union Convention on Preventing and Combating Corruption and the SADC Protocol Against Corruption.

3.2 Measuring corruption in Swaziland

3.2.1 Swaziland is, by all accounts, negatively affected by corruption. However no comprehensive research has been undertaken to analyze the nature and extent of corruption in Swaziland. The issue of corruption remains relatively 'new' on the public agenda with most policy responses formulated over the past fifteen years. The reasons for the lack of such research can be attributed to a number of factors including domestic political will, domestic resource constraints, non-prioritisation by the donor community and a lack of domestic research expertise on governance issues.

3.2.2 However the University of Swaziland was tasked to undertake a national survey on good governance in 2003. This may provide some useful indicators on perceptions of corruption in Swaziland. Some of the findings include:

- When asked to comment on whether the tax collection system in Swaziland was *free from corruption*, not a single respondent agreed, while 80.2% said the system was affected by corruption.

- Respondents were asked to comment on the extent to which so-called 'watchdog organisations' (including the judiciary and anti-corruption commission) enjoyed a degree of independence from the executive. The table below (Table 1) indicates that the majority (59.3%) felt that the watchdog institutions did not have autonomy and that they were subject to executive intervention. Very few (22.1%) were of the view that the watchdog institutions were independent.

Table 1: The operations of public complaints/watchdog institutions are:

	Number	**%**
Fully independent	5	5.8
Substantially independent	2	2.3
Fairly independent	12	14.0
Fairly substantially controlled	**16**	**18.6**
Totally controlled	**35**	**40.7**
No response	16	18.6
Total	86	100

- Respondents were also asked to comment on the effectiveness of watchdog organisations. The majority of the respondents (61.6%) were of the view that watchdog institutions were ineffective or rarely effective (see Table 2).

Table 2: Public complaints and watchdog organizations are:

	Number	**%**
Fully effective	7	8.1
Largely effective	4	4.7
Sometimes effective	10	11.6
Rarely effective	**26**	**30.2**
Ineffective	**27**	**31.4**
No response	12	14.0
Total	86	100

3.2.3 Recent anecdotal evidence also suggests that corruption is one of the major developmental concerns facing the Kingdom of Swaziland:

1. According to media reports quoting Finance Minister Majozi Sithole the government is losing 40 million emalangeni per month (480 million emalangeni per annum) to corruption. This could serve to repay two-thirds of the national debt. No detail exists of how the Minister of Finance has calculated these figures but he is reported as saying that, "The twin evils of bribery and corruption have

become the order of the day in Swaziland. The economy is dying gradually because of this practice, and citizens are placed under a heavy yoke."[6]

- Recent media reports have speculated that, "Corruption is the unofficial policy in the Kingdom of *Eswatini* [Swaziland] and runs through the national vein".[7] It's also speculated that almost all sectors of society are involved in corruption including the judiciary, legislature, media, civil society, the private sector, police, public service and other interest groups.[8]

- Confirming public speculation the Minister of Public Works and Transport recently publicly stated that his ministry was the most corrupt.[9]

- The Swazi Federation of Trade Unions is reported to be facing a rebellion amongst its affiliated unions, who have raised charges of corruption among federation executives.[10]

- A parliamentary select committee, recommending the cancellation of a contract for the purchase of a luxury jet for the monarchy noted in 2003 that: "The Prime Minister and three cabinet ministers acted beyond their constitutional responsibilities by entering a financial arrangement and committing national funds in a dubious project."[11]

- In 2002 news reports indicated that corruption was rife in the (then) deputy Prime Ministers office with claims that senior government officials were enriching themselves from the King's 40 million emalangeni Regional Development Fund.[12]

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[6] See: IRIN, Swaziland government embarks on anti-corruption drive. www.corisweb.org. 16 March 2005.
[7] See: The *Times of Swaziland* 17 March, 2005
[8] Op Cit, The *Weekend Observer*, 9-10 April, 2005.
[9] See: *Times of Swaziland*, 17 March, 2005
[10] See: UN Integrated Regional Information Networks, *Swaziland: Labour Movement Says Its Far From Dead*. All Africa.com. 06 May 2005
[11] See: United Nations Office for the Coordination of Humanitarian Affairs, *Showdown over royal jet.* www.corisweb.org. 20 March 2003
[12] See: BBC Monitoring Service, *Corruption said to be rife at deputy prime ministers office*. www.corisweb.org 15 May 2002

3.3 Past efforts to combat corruption in Swaziland - a brief overview

3.3.1 In an effort to address public concerns and/or complaints regarding corruption, Swaziland has made some attempts to establish and institutionalise bodies for dealing with corrupt activity. Against a backdrop of allegations of corruption in government in the 1980's, the then government established the office of the Ombudsman. Its mandate was to receive complaints from concerned members of the public, investigate them and deliver the results in order that appropriate action may be taken.

3.3.2 However, the office of the ombudsman was short-lived. Lingering public concerns about the possible political motivation for establishing the office of the Ombudsman may have resulted in a lack of public confidence and ultimately impeded its ability to fulfil its mandate. Lacking any real autonomy from the government of the day, it failed to command any credibility in the eyes of the public and as a result its existence was terminated with the departure of the government officials who had established the office.

3.3.3 Recognising growing public concern with corruption the Swaziland Anti-Corruption Commission was established in 1998 by the prevention of corruption order No .19 of 1993. The Commission, which receives its budget from central government, was allocated an amount of E 2,651,533 for 2001/2002. An additional amount of E 1,906 056 was allocated in the same year for payroll costs.

3.3.4 The Commission was entrusted with the responsibility of taking appropriate measurers for the prevention of corruption in both public and private bodies. To this end, the commission may examine the practices and procedures of public and private bodies in order to facilitate the discovery of corrupt practices; provide advice to institutions on the prevention of corruption; disseminate information on the evil and dangerous effects of corrupt practices in society and enlist and foster public support for measures against corruptions.

3.3.5 The Commission was empowered to receive complaints of alleged and suspected corrupt practices made against any individual and refer appropriate cases to the Director of Public Prosecution (DPP) for prosecution upon the completion of

investigations. The Commission also had powers to initiate investigation to the conduct of any public official that in the opinion of the Commissioner may be connected to corrupt practices. Some of the complaints received by the Commission may be rejected. The commission, for instance, may refuse to conduct an investigation if it is satisfied that the complaint is trivial, frivolous and vexatious or is not made in good faith or the investigation would be unnecessary, improper and futile.

3.3.6 As a public body whose activities are funded by the taxpayer, the Anti-Corruption Commission is required to produce an annual report detailing its performance. The 2001 annual report indicates that, for that year the commission dealt with a total of 117 cases, including enquiries (see Table 3).

Table 3: Corruption cases handled by the Commission:

CASES	NUMBER
Cases brought forward from previous year	14
Cases reported during year	33
Cases referred to other agencies	6
Cases proved to be civil	1
Cases otherwise disposed off	25
Cases handed to the DPP	10
Cases withdrawn at the instance of the DPP	1
Total cases with the DPP	21
Cases carried forward under investigation	6

Source: Annual Report for the Anti Corruption Unit, 2001.

3.3.7 The Anti-Corruption Commission has been saddled with serious problems since its inception. A major challenge, by its own admission, is that not a single case of corruption investigated by the Commission has ever been successfully prosecuted. The Commission is not empowered to prosecute the cases it has investigated but relies on the DPP's office to prosecute the alleged offenders. There has reportedly been a disjuncture in the operations of the two bodies, further compounding perceptions of the Commission ineffectiveness. In addition, the commission tended to restrict itself

to the investigation of corruption cases involving only junior officials and/or has been sidelined in the investigation of the high profile cases involving leading political figures. The marginalisation of the Commission in some serious allegations of corruption (particularly in 2002) tended to reinforce the perceptions that the Commission was dormant.

3.3.8 Whereas no political interference in the operations of the Anti Corruption Commission was reported, a number of factors tended to limit its effectiveness. These factors include:

- A lack of an enabling political environment
- A lack of adequately qualified staff, facilities (building) and financial resources
- A restrictive legal framework
- The delay in the appointment of the Commissioner
- The Political interference in the judiciary/justice system
- The lack of authority to prosecute; and
- The lack of serious commitment to prosecute offenders.

Chapter 4: An evaluation of the procedural structures in the Prevention of Corruption Bill 2005

4.1 Benchmarks for measuring laws to prevent and suppress corruption

4.1.1 Concerns around corruption are shared across the globe, and they have intensified in recent years. Commitment at transnational levels is evident in the advent of the regional and international milestones referred to above. The emerging anti-corruption tapestry is underpinned by the escalating call for greater efficiency, transparency and integrity in both public and private institutions. The call is driven by a number of factors:

i. the increasing realisation that the achievement of economic, political and social objectives in many countries is only possible by improving governance and preventing corruption;
ii. the observation that public sector corruption and maladministration act to reinforce the unequal distribution of opportunities and thus serve to undermine basic human rights;
iii. the equally valid observation that the private sector is culpable both in grand corruption cases involving the public sector as well as within itself; and
iv. the threat that corruption poses to economic growth, social development, the consolidation of democracy, and national morale.

4.1.2 Recognising these threats, countries all over the world are trying to create effective anti-corruption measures. From these measures, certain benchmarks by which to evaluate anti-corruption initiatives have emerged. Key among them are:

- whether the measures adopted improve the detection, investigation and prosecution of corruption,
- whether they rationalise the agencies combating corruption,
- whether the steps taken improve management systems and discipline at all levels of government,
- whether whistle-blowers and witnesses are protected,

4.2 Institutions responsible for implementing anti-corruption measures

4.2.1 The SADC Protocol and the two Conventions prescribe the adoption of measures which will create, maintain and strengthen institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption. The instruments emphasise, in particular, the need for the establishment of independent institutions to deal with the implementation and enforcement of anti-corruption measures. For these institutions to be effective, they need to be independent and free of interference.

SADC Protocol

Article 4(1)(g) of the SADC Protocol obliges each State Party to create, maintain and strengthen institutions dedicated to preventing, detecting, punishing and eradicating corruption. For these institutions to be effective, they need to be independent and free of interference.

AU Convention

The AU Convention contains a similar provision. In terms of Article 5(3) of the Convention State Parties undertake to establish, maintain and strengthen independent national anti-corruption authorities or agencies.

UN Convention

Article 6 of the UN Convention deals comprehensively with the establishment of independent preventative anti-corruption bodies. Article 6 provides as follows:

"1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

> (a) Implementing the policies referred to in Article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
>
> (b) Increasing and disseminating knowledge about the prevention of corruption.
>
> 2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided."
>
> The AU and UN Conventions emphasise the fact that these bodies, authorities or agencies should be independent and free from undue influence. In terms of the UN Convention the duties of these bodies should include overseeing and coordinating anti-corruption policies and disseminating knowledge on preventing corruption.

4.3 The position of the Bill regarding independence of the Anti – Corruption Commission

4.3.1 Clause 3 establishes the Commission, but stipulates that it comprises 2 persons, the Commissioner and Deputy Commissioner. The reason for limiting the Commission to two officers is not clear. It appears from the rest of the Bill that the Commission is intended to be larger than just two top officials. It would be preferable to provide that the Commission consist of the Commissioner, the Deputy Commissioner and other officers that may be appointed by the Commissioner in terms of the Bill. Such a

formulation will make it easier to extend the same protection to all the officers of the Commission beyond the top two. In addition, it will enable the legislature to address issues of relevance to the effectiveness of the Commission, such as qualifications, professional skills, equity, and conditions of service. As the Bill stands all these are left to the discretion of the appointing authority.

4.3.2 Indeed, the Bill proposes that the Commission should form part of the public service. (Clause 9) The views of most of the respondents with whom this issue was discussed was that incorporating the Commission into the public service would negate the good intentions behind clause 4(4), and call into question the Commission's autonomy. A specific argument is that some person or authority could manipulate, stifle or influence the Commission's work by withholding resources, or benchmarking conditions of service against unrelated sections of the public service.

i. The processes by which the Commissioner and Deputy Commissioner are appointed and removed have been considered critical in every country that has created a similar body in the last decade. In each case, the challenge is to insulate the process by which the leadership of anti-corruption commissions is selected from compromising influences. A key issue is the extent to which the selection process of the Commissioner and his or her deputy is exposed to the patronage of political or business interests. Related to this is the tenure of the incumbent(s). Tenure has a bearing on their ability to discharge their responsibilities impartially and courageously, 'without fear or favour'.

ii. The Commissioner and Deputy Commissioner are appointed in terms of the Bill, by the King (as head of state), on the advice of the Judicial Service Commission (JSC). Both are envisaged to be civil servants. As regards the selecting authority, the draft Bill is not specific, but the formulation employed (*on the advice of*) implies that it is the responsibility of the JSC. The only stipulated credential for a prospective Commissioner is that he or she should qualify for appointment as a judge of the High Court. The Bill is a bit more expansive in respect of the credentials of a prospective Deputy Commissioner. [Clause 5 (2)] The qualifications for

appointment as a judge of the High Court will presumably be those stipulated in clause 155(1)(b) of the Draft Constitution. Clause 155(1)(b) states them to be - high moral character; integrity, and ten years practical experience as a legal practitioner in Swaziland, or any part of the Commonwealth of Ireland. It would be useful if these qualifications were restated in the Bill.

iii. The separation of functions between the selecting and appointing authorities will be an effective safeguard against patronage and improper influence if the two are truly independent of each other. In other words the appointing authority should not wield excessive influence over the composition of the selecting authority.

iv. In terms of clause 160 of the Draft Constitution, the entire membership of the JSC is appointed by the King without reference to anyone. This tends to create the impression that the JSC cannot act independently of the King.

4.3.3 This concern may be ameliorated by article 66(3) of the Draft Constitution, which stipulates that:

> '(3) Where the King is required to exercise any function on the advice or recommendation of any person or authority, he shall exercise that function on that advice or recommendation, save that the King may before acting on the advice or recommendation, in his discretion, once refer back that advice or recommendation in whole or in part for reconsideration within ten days by the person or authority concerned.'

4.3.4 Be that as it may, if the selection by the JSC is to be perceived to be removed from the influence of the appointing authority, it is necessary to lay down a selection process that is relatively open and transparent for the JSC to follow, before recommending appointments to the King. To enhance confidence in the fairness of the recruitment process, the nomination process should involve civil society groups, employer and labour organisations and professional formations (including, but not just the law society). They should be invited to nominate qualified persons for interview and appointment if found to be the most suitable.

4.3.5 Security of tenure for high public officials is intended to fortify their protection from illegitimate pressure emanating from the threat of dismissal. The Commissioner is appointable on a contract of up to five years, renewable once. The same terms pertain to the Deputy Commissioner. It appears that either of them could be appointed for a period as short as one year or as long as five years. Lack of certainty exposes this condition of service to unregulated executive discretion, which could be used improperly.

4.3.6 Given the tasks assigned to the Commission, this uncertainty is not in the interests of combating corruption. It is suggested that the bill fixes a term. Responses received during our survey indicated support for the prospect of a single term renewal of contract. It would also be desirable to provide protection for the conditions of service of all the officials of the Commission during their tenure of office, so that, for instance, their remuneration may not be reduced in nominal or real terms.

4.3.7 The King may dismiss the Commissioner and his or her Deputy, after consultation with the JSC. There are two permissible grounds for removal from office:

i. misbehaviour, or
ii. inability to perform the functions of their office

It appears that, from the wide range of possibilities, the misbehaviour envisaged is of such a nature as to discredit the Commission, or compromise its capacity to function. The Bill could make this clearer. Furthermore, as there could be disagreement as to whether any misbehaviour occurred, or as to its relevance to the credibility or work of the Commission, it may be necessary to stipulate for an inquiry into alleged misbehaviour as a prerequisite for dismissal. At the level of the Commissioner, it is suggested that a judicial inquiry be held if required (i.e. if there is a dispute).

4.4 Location of Commission and co-ordination with other institutions

4.4.1 The Commission will be established as a statutory, rather than a constitutional structure. In view of the proposed introduction of a Commission on Human Rights and Public Administration (Human Rights Commission) as part of the Constitution (Chapter X Part 2) it would be prudent to harmonise the division of responsibilities

between them. A conflict may develop, since clause 165(1)(b) and (e) of the draft Constitution requires the Human Rights Commission to investigate corruption. If the intention is to subject the Commission to oversight by the Human Rights Commission, this should be made explicit. The position in other countries is to provide the framework for the Anti-Corruption Commission in the Constitution, even though detailed regulatory provisions relating to its administration and functioning may be set out in a statute.

4.4.2 As a law enforcement agency, the Commission will work in the same area as the police and the pre-existing prosecution service. The Bill gives the Commission extensive powers of arrest and investigation. It does not give the Commission prosecution powers. Respondents were agreed that if it is to be effective, the Commission should quickly develop a prosecution capacity. At this point in time, it is not prudent for the Commission to depend on the Director of Public Prosecutions (DPP). It was not considered by most to be necessary for the Commission to require the consent or authorisation of the DPP before taking cases to court. The qualifications required for appointment to the office of Commissioner, and the extensive powers vested in the Commission would appear to support this proposition.

4.4.3 A key question is the possibility of duplication of investigations and conflicts over turf. A case could be reported to both the police (for instance, as fraud) and the Commission (as corruption), possibly by different complainants. If there is no co-ordination between the police and the Commission, the two agencies could end up duplicating work, and tripping over, rather than complementing each other. An effective mechanism by which information on case reports is shared needs to be found, even though it may not be written into the Bill. An electronic database that is secure, but accessible to the police and the Commission is required.

4.5 Funding the Commission

4.5.1 The Commission is to be funded by government, through the Ministry of Justice. Adequacy of funding is a critical issue, as an under-funded Commission might be worse than no Commission at all. We are cognisant that the Commission will

compete for scarce resources with other public institutions to be established in terms of the Draft Constitution, such as the Human Rights Commission.

4.5.2 The under-funding of judicial structures in the current environment has been observed and noted in the report of the International Bar Association Human Rights Institute published in March 2003. The issue of funding the Commission was accordingly mooted and discussed with the Ministry of Justice, with officials of the former Anti-Corruption Commission and with others. It was acknowledged to be potentially problematic.

4.5.3 Former Commission officials were clear about the accommodation needs of the Anti-Corruption Commission. The Commission should be housed in premises that are detached from other government buildings, and are easily accessible to the public. There should be a gradual decentralisation of the points to which reports to the Commission can be made, which will require the provision of further accommodation premises outside the major centres of Mbabane and Manzini.

4.5.4 Operational funding is more difficult to estimate. As the scale of corruption in Swaziland has yet to be quantified, the enormity of the challenge for which funds should be provided is unknown. It is often difficult to budget accurately for law enforcement in the field of economic crime. Cases with translational dimensions can be costly to investigate. Occasionally, law enforcement agencies have to decide whether to pursue such investigations or abandon them as costs escalate. The first point on which consensus emerged was the need for a dedicated budget for the Commission. Its budget should be independent of that of the Ministry of Justice. A model framework may be found in article 142 of the Draft Constitution.

4.5.5 It was also agreed that core funding for the Commission should be derived from the treasury. However, government funding on its own is likely to be inadequate. A mechanism by which to supplement law enforcement budgets in general, and that of the Commission in particular may have to be explored and written into the legislation.

4.5.6 The establishment of a fund into which proceeds of crime are paid, and from which some of the expenses of law enforcement can be paid needs to be considered. It must

be observed that the viability of the fund depends on the availability of civil forfeiture by the courts. While forfeiture of proceeds of crime forms part of Swazi law, it is predominantly tied to criminal proceedings, and contingent on conviction. Civil forfeiture of property on the basis that it is tainted (even though the holder has not been convicted of an offence) is confined to motor vehicle theft cases. (Section 20 of the **Theft of Motor Vehicles Act**). It is suggested that the forfeiture provisions in that Act be adapted for application to corruption cases. The simplest way seems to be by amplifying the provisions of clause 49 of the Bill.

4.5.7 The seizure and confiscation of proceeds of crime has been considered in regional and international legal frameworks.

SADC Protocol

Article 8(1) of the SADC Protocol requires each State Party to adopt measures to enable—

"(a) confiscation of proceeds derived from offences established in accordance with this Protocol, or property the value of which corresponds to that of such proceeds; and

(b) its competent authorities to identify, trace and freeze or seize proceeds, property or instrumentalities for the purpose of eventual confiscation.".

The **AU Convention** deals with the issue in Article 16 while the **UN Convention** covers it in Article 31.

4.5.8 Proceeds of crime might be required to be administered and managed before disposal. This brings in a dimension that is not a core activity of a law enforcement agency. Experience has built up, in neighbouring countries and elsewhere (South Africa, the United Kingdom, Australia, Ireland) in the pre-forfeiture administration of seized

assets. A fund to pool the proceeds of economic crime will benefit organisations other than the Commission as well.

4.6 Accountability and reporting

4.6.1 The Bill is commendable in setting up lines of accountability in two spheres, between the Commission and complainants and between the Commission and parliament. In both spheres, accountability could be further developed.

4.6.2 When the Commission declines to investigate a complaint of corruption, it has to inform the complainant in writing, but the complainant is not entitled to be given reasons for the decision. The Commission is not obliged to account to the complainant at any stage before then, for example as to the progress with the complaint. There is also no stipulated period by which the decision not to proceed with the case should be communicated. The silence of the Bill may lead to abuse.

4.6.3 A related issue is whether the Bill restricts the discretion of the Commission to determine whether or not to pursue investigations. The open discretion principle, which informs practices in many jurisdictions that are rooted in the English common law system, gives prosecuting authorities unrestricted power to refuse to pursue a complaint through the criminal justice system even if the evidence to support it is adequate for a conviction. One of the arguments in support of the principle is that it enables prosecuting authorities to take account of practical (and political) considerations in making decisions on case disposals. While there is merit in this reasoning, the unexplained use of discretion can yield undesirable results, in that it can be abused to suppress the prosecution of the influential. Notwithstanding the dual legal system, the dominant prosecution tradition in Swaziland was inherited from English common law. In view of that reality, and the fact that the Commission will have to work with institutions that may use open discretion, a specific deviation from the principle is required.

4.6.4 Clause 10 (2) circumscribes the permissible grounds for declining to take up or pursue an investigation. The Commission may do so if it is satisfied that:

i. The complaint is trivial, frivolous, vexatious or not made in good faith; or

ii. The investigation would be unnecessary, improper or futile

4.6.5 Not much argument is likely to be provoked in the cases falling under the first part of clause 10(2). The pursuit of trivial, frivolous and vexatious complaints is bound to be wasteful. The Commission should also not be used in order to pursue private vendettas, personal squabbles or political attrition campaigns. Resort to the reasons envisaged in the second part is more problematic. The grounds for non-pursuit of reports are potentially controversial. A decision to abandon an investigation as 'unnecessary' may provoke anger, and precipitate some form of challenge. There will not always be consensus as to what an 'improper' corruption investigation is. Whether an investigation is 'futile' will not always be uncontroversial. Looked at from the standpoint of the complainant, or the public, the invoking of any of the three grounds in clause 10(2)(b) could represent an undesirable use of open discretion.

4.6.6 To prevent abuses, use of these grounds should be justiciable, in the sense that the refusal to pursue the complaint should be reviewable by the High Court. The difficulty of implementing judicial review might arise from its potential conflict with clause 4(4). Clause 4(4) seeks to reinforce the autonomy of the Commission, by declaring that the Commissioner and Deputy Commissioner are not subject to the direction and control of any person or authority in performing their functions. A court directive to investigate a case would violate this provision, unless judicial review was specifically excluded. As an alternative, it is possible to preserve judicial review in these circumstances by writing it into the right to administrative justice. The right, as formulated in the Draft Constitution shown to us, is however, too narrowly conceived to perform this function. It is confined to a person appearing before an administrative authority.

4.6.7 The Commission is required to report to parliament within three months of the end of each financial year. The report is tabled by the Minister of Justice, and may not go into detail about the operations of the Commission. On the face of it, accountability to the legislature is indirect, and only covers selective detail. However, in view of the permissible structuring of parliament into standing portfolio committees that have authority to hold any government structure to account for its performance, there is ample scope for accountability at this level. The issue is whether it is comprehensive

and adequate. The view was expressed that reporting to parliament through the Minister of Justice is not problematic at all. This is the method by which independent institutions, such as the courts, interact with parliament. In the final analysis, however, the weight of most submissions was that indirect reporting through the Minister was neither comprehensive nor adequate.

4.7 Supporting laws and institutions

4.7.1 The impending introduction of a new constitution creates the impetus for fundamental institutional reform. Advantage should be taken of this impetus to embed institutions that are durable. This proposition is particularly apposite to the proposed new Anti-Corruption Commission.

4.7.2 As a general proposition, the Commission is likely to succeed if it is assisted by a conducive legal and institutional environment. The Commission requires the support of an effective, efficient and knowledgeable judiciary. It should also rely on an informed public. Most importantly, other institutions that are established to support the rule of law and constitutionalism need to be strengthened. At the same time, a sustained effort should be mounted to establish public confidence in:

- the will of government to combat corruption at all levels
- the ability of government to combat corruption at all levels
- the general competence of government to enforce court decisions.

4.7.3 Our attention was drawn to instances of default by key government institutions in the enforcement of court decisions. This appears to have spawned much scepticism about government's commitment in respect of the other two spheres. As a result, it is imperative for government to embark on a significant campaign to win the confidence of local and international stakeholders. The precise methods by which to do this are for government to determine. A few suggestions can however be made.

4.7.4 A means of engendering public trust is to open up discussion of the Bill to organised formations of civil society. The media in Swaziland seems to be receptive to the idea of greater involvement in disseminating information and views on the Bill to the general public. In other words before the legislative debate occurs, it should occur in

the public sphere. The Principal Secretary for Justice was quoted to have indicated that following its publication in the Gazette, the Bill would be open for debate and submissions could be directed to the Attorney General's Office. Thirty days will be allowed for such engagement. The interest stimulated during our short sojourn in Swaziland seems to show that that period may not be long enough. It may also be that there should be a broader range of avenues through which to receive submissions on the Bill.

4.7.5 Measures need to be taken to establish systems of government relating to hiring and procurement of goods and services. Indeed, the regional and international instruments signed but not yet ratified by Swaziland create certain commitments in this respect.

The **SADC Protocol** calls on each State party to adopt measures to create, maintain and strengthen systems of government hiring and procurement of goods and services that ensure the transparency, equity and efficiency of such systems. This is an area that presents tempting opportunities to commit corrupt activities, involving huge amounts of money. The SADC Protocol aims to compel the exercise of tighter control regarding the hiring and procurement of goods and services.

Article 5(4) of the **AU Convention** obliges State Parties "to adopt legislative and other measures to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services."

In terms of Article 9 of the **UN Convention** a State Party must establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective in preventing corruption.

4.7.6 An issue that we considered is whether dedicated anti-corruption courts should be established. It was argued that corruption cases should not compete with other cases for court space and time. 'Mixing' them up may result in corruption cases being crowded out. In support of this contention, the broader coverage of corrupt activities in the Bill compared to the **Prevention of Corruption Order** (1993) was highlighted. Implementation of the Bill will precipitate a greater volume of corruption cases, adding to the backlog in the existing criminal courts. There is merit in the proposition for special courts, but in the absence of information on the extent of corruption in Swaziland, it was difficult to express a conclusive view one way or the other.

4.8 Mechanisms to promote access to information

SADC Protocol

In terms of Article 4(1)(d) of the SADC Protocol each State Party undertakes to adopt measures, which will create, maintain and strengthen mechanisms to promote access to information to facilitate eradication and elimination of opportunities for corruption.

AU Convention

The AU Convention contains a similar measure. Article 9 of the AU Convention deals with this measure under the heading *"Access to Information"*. It stipulates that each State Party should adopt laws and other measures to facilitate access to any information required to fight corruption and related offences. Furthermore, in terms of Article 12(4) of the AU Convention each State Party undertakes to ensure that the media has access to information in cases of corruption and related offences if the dissemination of such information does not adversely affect:

- the investigation process and
- the right to a fair trial.

UN Convention

Under the heading *"Participation of society"*, Article 13 of the UN Convention deals, among others, with the right to have access to information. In terms of Article 13(1) of the UN Convention each State Party must take appropriate measures to:

- promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in preventing and combating corruption and raise public awareness regarding the existence, causes and gravity of corruption.

4.8.1 Regarding the extent to which information should be made accessible to the public, the UN Convention provides a useful guide. State parties are enjoined to enhance

transparency in its public administration, including with regard to its organisation, functioning and decision-making processes. Specific measures include:

i. procedures or regulations that allow members of the general public to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern the public;
ii. simplifying administrative procedures to facilitate public access to the competent decision-making authorities; and
iii. publishing information, which may include periodic reports on the risks of corruption in its public administration.

4.8.2 Two issues arise concerning dealings with sources of information on corruption, namely:

- protection, and
- incentives

4.8.3 The greatest source of protection for an informer lies in a system that is both discrete and efficient in receiving and taking up complaints without compromising source confidentiality. An informer is likely to feel sufficiently confident to disclose information about corruption if they believe that they will not incur reprisals for such disclosure. The assurance should be rooted in the law, but for practical purposes, perceived attitudes and observed responses will be more influential to the prospective source of information. Thus, if he or she thinks that the corrupt person is either immune from the reach of the criminal law, or not subject to investigation by the authority to which the report is directed, the informer will not submit a report. A report in those circumstances will be considered not just futile, but possibly dangerous as well, as it may precipitate penalties.

4.9 Position regarding access to information in Swaziland

4.9.1 It is envisaged that the Commission will depend on reports from the public. Three inter-related issues arise. The first is whether citizens, civil society organisations and the news media will have greater access to information to enable them to find out and report corruption. The second is whether whistleblowers will be protected. Finally, what mechanisms will be introduced to encourage corruption reporting.

4.9.2 Where corruption occurs within departments of government and private sector institutions, insiders will be a particularly relevant source of information (to initiate an investigation) and evidence (to prove alleged corruption).

4.9.3 The current law in Swaziland vests authority in public officials to control access to official information. Access to information that may be relevant to misconduct or unlawful conduct can be restricted or prohibited by invoking the Official Secrets Act (1968).

4.9.4 The existence of enclaves of immunity was a recurrent theme in some of the statements made to us during our visit. There are perceptions that the co-existence of the traditional and non-traditional systems of administration and politics may have been, or is being exploited to provide sanctuary to corrupt elements. Since 2000, the conduct of certain members of the executive has tended to feed perceptions of immunity from the non-traditional judicial system at certain levels of government. Attempts to enforce the law or specific court decisions against those members of the executive have been abortive. In certain cases, law enforcement officials trying to perform their duty have been intimidated. The resulting environment is one in which it is unlikely that complaints of wrongdoing, including corruption are unlikely to be made against those perceived to be immune from the law. In view of clause 10(1)(b), the Commission and government should publicise the fact that the Commission is empowered to investigate corrupt practices by any person in Swaziland.

4.9.5 In addition to whistle blower protection, there may be a need to provide incentives for sources of information, in the form of rewards to those who report corruption cases in which proceeds are confiscated. In some parts of the world, it has become common to

offer a percentage of the sum of money recovered to an informer. It is necessary to be aware that the system can create a 'bounty-hunting' industry, opening up a new arena for corrupt conduct. Anti-corruption operatives in certain parts of the world have been known to derive benefit from incentive schemes set up for whistle blowers through extortion or collusion. Intended beneficiaries may be induced to share rewards with such operatives or risk disclosure of their role. The mechanism by which whistle blowers are protected should take account of the risk of this kind of intimidation.

4.9.6 Clause 55 of the Bill provides a basic framework for the protection of informers in subsequent court proceedings, but does not go far enough to take account of the concerns described. Beyond this clause, Swaziland does not have any law to protect whistle blowers from victimisation. In this respect, it falls short of the prescriptions of the SADC Protocol (Article 4(1)(e), the AU Convention Article 5(6) and Article 33 of the UN Convention.

4.9.7 As regards the public sector information relating to procurement, expenditure is important to the detection and investigation of corruption. The public auditing structures have a high profile in this regard. There should be no areas that are beyond the purview of the Auditor General's office. As an institution to enforce public accountability, it is imperative to underpin the independence, impartiality and autonomy of the office in law. The **Audit Bill** (2003) appeared to be intended to commence that process. Unfortunately it has yet to be passed. It is suggested that it be revived simultaneously with the Prevention of Corruption Bill, as the two are mutually complementary.

4.10 Scope of application of anti-corruption laws

SADC Protocol

In terms of Article 5(1) of the SADC Protocol each State Party must adopt measures necessary to establish its jurisdiction over the offences established in accordance with the SADC Protocol when:

(a) the offence in question is committed in its territory;
(b) the offence is committed by one of its nationals or by a person who habitually resides in its territory; and
(c) the alleged criminal is present in its territory and it does not extradite such person to another country."

AU Convention

Article 13 of the AU Convention contains a similar provision, but adds a paragraph to take account of instances where the offence, although committed outside its territory, has a negative impact on the country. Article 42 of the UN Convention is even more comprehensive

4.10.1 Position regarding jurisdiction in the Bill

There are various provisions in the legislation of Swaziland regulating this Requirement. These incude:

(a) the corruption offences created in the Prevention of Corruption Bill may be committed **"in Swaziland or elsewhere".**

(b) **Section 9** of **the Money Laundering (Prevention) Act, 2001**, provides that notwithstanding anything to the contrary contained in this Act or in any other law, any offence under this Act may be investigated, and prosecuted in Swaziland "regardless of whether or not the offence occurred in Swaziland or

in any other country, but without prejudice to extradition where applicable.". (Emphasis added)

(c) **Section 16** of the Act provides that a person who has been convicted of a prescribed offence **(whether in Swaziland or elsewhere)** or of an offence under this Act may not be eligible or licensed to carry on the business of an accountable institution.

(d) Furthermore**, section 18(1)** of the Act provides that where a person has been charged or is about to be charged with a money laundering offence, the competent authority may make an application to the Court freezing the property of, or in the possession or under the control of that person, **"wherever such property may be".**

The above provisions only partly cover the requirements provided in the three instruments regarding jurisdiction over corruption offences and therefore a review of the existing law will be necessary.

4.10.2 Collateral processes

This part deals with collateral processes that may have a bearing on investigations by the Anti-Corruption Commission. A development that may impact on the efficacy of the Commission is the appointment of a tribunal, such as a judicial commission of inquiry, to probe a matter that is already under investigation by the Commission. The intervention of such a tribunal could be a positive or negative development. It may be that the capacity of the Commission to investigate the matter to be taken over by the inquiry is inadequate, or that the resources required would unduly tax the coffers of the Commission. It may also be simply that the issues raised by the investigation are broader than the mandate of the Commission. An inquiry may, in that event, be a better option. On the other hand, the mechanism of an inquiry can be abused, in bad faith, to manage a politically sensitive investigation, or even sabotage an effective investigation, while giving the opposite impression.

A study of judicial inquiries of the kind under discussion in the region reveals that several features combine to make them particularly susceptible to manipulation:

- the ability of the executive to appropriate the proceedings and findings. This is usually achieved by directing that the inquiry proceedings occur in camera, and that the findings be submitted exclusively to the head of state or minister. Release or publication thereafter is entirely discretionary.
- inability to implement findings or recommendations. While the inquiry can find that a crime has been committed, and even recommend prosecution, prosecution is the ultimate prerogative of the Director of Public Prosecutions (DPP). Even then, the DPP only becomes seized of the matter if the executive chooses to refer the inquiry report to him.

The southern African region has many examples of both the positive and negative uses of judicial inquiries. We did not come across any instances of abuse of inquiries in Swaziland, but the potential for abuse cannot be ruled out. The framework for inquiries is the **Commissions of Inquiry Act** (1963), in terms of which any minister may establish an inquiry, of their own initiative or at the instance of parliament. Inquiries generally take place in private, and the findings are not published, unless parliament directed the inquiry, in which case the report would be tabled there. The Act confers discretion on the minister on matters such as the composition of the inquiry team.

It seems that an approach that combines the value of a dedicated anti-corruption institution and an inquiry appointed by the executive should be designed. If an inquiry is established to take over an investigation instituted by the Commission within its mandate, the law should insist that the Commission be represented in the inquiry. The form of representation may be as part of the team leading evidence or assisting the judicial commissioner. As regards the use of the findings of the inquiry, the law relating to the appointment of the inquiry should stipulate for a time-bound mechanism by which to hold the executive accountable to the public. A time limit for the publication of the findings should be stipulated in legislation. In the event of default, it should be open to the Commission to publish the findings, or for a court to order publication.

4.10.3 Extradition

> **UN Convention**
> Article 44 of the UN Convention deals comprehensively with extradition. Most of the provisions contained in Articles 9 and 15 of the SADC Protocol and the AU Convention, respectively, are also contained in the UN Convention.

The Bill does not cover extradition matters which are extensively covered by the Extradition Act, 1968 and the Fugitive Offenders (Commonwealth) Act 1969. It is recommended that legislation on extradition be audited with a view to incorporation of recent developments in this area.

4.10.4 Judicial Cooperation and mutual legal assistance

> **UN Convention**
> Various provisions of the UN Convention deal in detail with mutual legal assistance and cooperation between State Parties and law enforcement agencies.

Matters relating to mutual legal assistance are not covered directly by the Bill.
The Criminal Matters (Mutual Assistance) Act, 200 extensively and adequately deals with mutual legal assistance matters.

Chapter 5: An evaluation of the procedural structures in the Prevention of Corruption Bill 2005

5.1 Corruption committed by a public official

5.1.1 Passive corruption

SADC Protocol

Article 3(1)(a) of the SADC Protocol describes this act of corruption as follows:

"The solicitation or acceptance, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.".

In many countries this act of corruption is called passive corruption. In short, it can be described as the acceptance of any undue advantage by a public official in exchange for performing a corrupt act relating to his or her public functions. It is important to note that the act of corruption is committed by a **public official** in the performance of his or her public functions. In terms of Article 1 of the Protocol the definition of **"public official"** is important for this act of corruption. It is defined to mean:

> "any person in the employment of the State, its agencies, local authorities or parastatals and includes any person holding office in the legislative, executive or judicial branch of a State or exercising a public function or duty in any of its agencies or enterprises;"

AU Convention

Article 4(1)(a) of the AU Convention contains an almost identical act of

corruption. However, in terms of this provision the benefit may be solicited or accepted by "a public official or any other person".

UN Convention

Article 15(b) of the UN Convention, under the heading "*Bribery of national public officials",* prohibits a similar act of corruption, namely:

"The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.".

The following persons qualify as a **"public official"**:

(a) those defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;

(b) any other person defined as a **"public official"** in the domestic law of a State Party. However, for the purpose of some specific measures contained in Chapter II of the UN Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.

5.1.2 Active corruption

SADC Protocol

Article 3(1)(b) of the SADC Protocol describes active corruption as:

(b) "The offering or granting, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such

> as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions."

As in the case of Article 3(1)(a) of the SADC Protocol, this act of corruption is committed by a public official in the performance of his or her public functions. Therefore, the definition of **"public official"** is also relevant in respect of active corruption.

AU Convention

Article 4(1)(b) of the AU Convention contains an almost identical act of corruption. However, it is important to note that the AU Convention, among others, describes it as the offering or granting **"to a public official or any other person"**, of any benefit for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions. It appears that the wording in the SADC Protocol referring to "**by** a public official", is erroneous, and should be similar to that used in the AU Convention, namely, "**to** a public official"

UN Convention

Article 15(a) of the UN Convention contains an act of corruption. This provision envisages prohibiting the following act of corruption:

> "The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties."

This provision also refers to the giving of a benefit "**to** a public official", and is in line with the act of corruption described in the AU Convention.

5.2 Act by public official or other employee for purpose of obtaining benefit that is not due.

SADC Protocol

Article 3(1)(c) of the SADC Protocol describes this act of corruption as follows:

> "(c) Any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for himself or herself or for a third party."

As in the case of Article 3(1)(a) and (b) of the SADC Protocol, this act of corruption involves an act in the performance of his or her duties by a "public official". Therefore, as indicated in paragraph 4.4 above, the definition of **"public official"** as defined in paragraph 1 of the SADC Protocol is also important in relation to this act of corruption.

AU Convention

Article 4(1)(c) of the AU Convention contains an identical provision. However, it is important to note that in terms of the last-mentioned provision, the act of corruption may be committed by "a public official or any other person". Therefore, the act of corruption as described in the AU Convention is also applicable in respect of employees in the private sector.

UN Convention

Article 19 of the UN Convention under the heading *"Abuse of functions"* contains a similar provision. This Article provides as follows:

> "Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."

As in the case of Article 3(1) (c) of the SADC Protocol, the above provision of the UN Convention only deals with the abuse of functions by "a public official".

The regional and international instruments contain similar provisions. However, whereas the **SADC Protocol** and **UN Convention** provide for the act of corruption to be committed by "a public official", the **AU Convention** provides that the act of corruption may also be committed by "any other person". The formulation regarding the motivation for the abuse of power is wider in the UN Convention than in the SADC Protocol and the AU Convention. Corruption is committed if the accused abused power so as to obtain an undue advantage for himself or herself or for another person or entity. The advantage need not be a benefit.

5.3 Position regarding active and passive corruption in the Bill

5.3.1 The *Prevention of Corruption Bill, 2005*, regulates acts of bribery by or against a public officer. In terms of clause 21(1) of the Bill any public officer who, whether in Swaziland or elsewhere, solicits or accepts any advantage as an inducement to or as reward for or otherwise on account of that public officer—

"(a) performing or forbearing to perform or having performed or forborne to perform any act in his capacity as such officer;

(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of any act, whether by that officer or by another public officer in the officer's or that other public officer's capacity as such public officer; or

(c) assisting, favouring, hindering or delaying or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public or private body, commits an offence."

5.3.2 The Bill is silent on the abuse of public office or power, which is a major weakness. Some of the submissions made to us indicated that some of the corruption in Swaziland stems from, or is in the form of favouritism and nepotism.

5.4 Active or passive corruption by a person working in the private sector

SADC Protocol

Article 3(1)(e) of the SADC Protocol describes these acts of corruption as follows:

e) " The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties.". The elements of the above acts of corruption are similar to active and passive corruption committed by a public official as prescribed in Article 3(1)(a) and (b) of the Protocol. However, in Article 3(1)(e) above, the act of corruption is committed by "any person" working for a "private sector entity".

This provision is line with recent trends to also concentrate on the prevention of corrupt activities in the private sector. In this regard it is important to note that the preamble of the SADC Protocol specifically emphasises that Member States have the responsibility to hold corrupt persons "in the public and private sectors accountable and to take appropriate action against persons who commit acts of corruption in the performance of their functions and

duties". See also Article 2(1)(a) to (c) of the SADC Protocol in terms of which the purposes of the Protocol are prescribed to "prevent, detect, punish and eradicate corruption in the public and private sector."

AU Convention

Article 4(1)(e) of the AU Convention contains an almost similar provision. The AU Convention also emphasises the importance of preventing and combating corruption in the "public and private sectors." See for example Article 2(1) of the AU Convention. Furthermore, Article 1 of the AU Convention defines "private sector" as
"…the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government;"

UN Convention

Article 21 of the UN Convention contains a similar provision dealing with "Bribery in the private sector". This Article provides as follows:
"Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.".

Article 22 of the UN Convention also provides for the prohibition of "Embezzlement of property in the private sector". In terms of this Article each State Party must consider adopting such legislative and other measures "as may be necessary to establish as a criminal

offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position."

Section 23 of the Bill deals in particular with corrupt transactions by or with public bodies or private bodies. The Bill covers active and passive corruption in the private sector. However, it is recommended that section 23 can be improved by incorporation of Article 22 of the UN Convention.

5.5 Diversion of property by a public official

SADC Protocol

Article 3(1)(d) of the SADC Protocol provides that the following act of corruption must be prohibited by Member States:

"(d) the diversion by a public official, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official received by virtue of his or her position for purposes of administration, custody or for other reasons.".

As in the case of Article 3(1)(a), (b) and (c) of the SADC Protocol, this act of corruption is also committed by "a public official", as defined in paragraph 1 of the SADC Protocol. The definition of **"property"** is also is relevant. Article 1 of the SADC Protocol defines **"property"** to include "assets of any kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible and any document or legal instrument evidencing title to, or interest in such assets;".

AU Convention

Article 4(1)(d) of the AU Convention contains a similar prohibition. This act of corruption is described as follows:

"the diversion by a public official or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;".

In terms of the AU Convention, corruption of this nature may be committed by "a public official or any other person". The AU Convention does not define "property".

UN Convention

Article 17 of the UN Convention provides that:

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.".

Article 17 deals not only with the diversion of such property, but also with its embezzlement and misappropriation. Furthermore, the provision of the UN Convention also relates to the diversion of "public or private funds or securities or any other thing of value entrusted to the public official".

5.6 Position regarding diversion of property in the Bill

The Bill does not cover the diversion of property by a public official. Although Section 24 of the Bill provides for the offence of cheating of public revenue by diverting money from the public revenue, it falls short of the offence envisaged by the three instruments. It is therefore recommended that this gap be addressed by the Bill and the offence created should cover public officials and "any other person".

5.7 Improper influencing of any person's official decision making functions

SADC Protocol

In terms of Article 3(1)(f) of the SADC Protocol the following should be an offence:

> "(f) The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of the influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.".

This prohibition applies to persons performing functions in the **"public or private sector".** The prohibited acts of corruption entail active as well as passive corruption committed by a person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector.

AU Convention

Article 4(1)(f) of the AU Convention contains an identical act of corruption.

UN Convention

Article 18 of the UN Convention deals with this provision. Under the heading "*Trading in influence"* this Article provides as follows:

> "Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;
>
> (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.".

5.8 Position regarding the use of improper influence in the Bill

Section 22 of the Bill adequately covers the use of improper influence over the decision making of any person performing functions in the public or private sector.

5.9 Other acts of corruption prohibited by the AU and the UN Convention

Apart from the acts of corruption discussed above, the AU Convention and the UN Convention also prohibit certain other acts of corruption that are not specifically mentioned by the SADC Protocol. These acts of corruption are the following:

5.9.1 Illicit enrichment

In terms of Article 8(1) of the AU Convention State Parties undertake to adopt the necessary measures to establish under their laws an offence of **"illicit enrichment".** Where such an offence has been established by a State Party, it shall be considered an act of corruption or a related offence for the purposes of the AU Convention.

Article 20 of the UN Convention contains a similar provision. In terms of the said provision illicit enrichment is committed where there is a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. Article 1 of the AU Convention contains an identical definition.

5.9.2 Position regarding illicit enrichment in the Bill

Section 34 of the Bill covers this amorphous phenomenon under the description 'possession without reasonable explanation of property.' This offence conforms to the provisions of the AU and UN Conventions on illicit enrichment. Evidence of illicit enrichment manifests itself as unexplained wealth. Unexplained wealth is relevant to combating corruption, in so far as it constitutes tangible evidence of corruption and provides proceeds for confiscation. Swaziland recognizes the value of legislating for a method by which to use the existence of unexplained wealth to prove participation in, or deriving a benefit from corruption. The presumption of corruption that comprised section 26 of the **Prevention of Corruption Order** (1993) was reproduced in the Bill as clause 34.

The provisions of clause 34 should be read with Chapter XVII of the Draft Constitution, which create a set of new rules regarding the disclosure of assets and liabilities by designated public office holders, listed in article 241(2). Declarations are to be made to the Human Rights Commission, in its capacity as the Integrity Commission. It appears that it is envisaged that the Integrity Commission will verify declarations made to it, using its own investigators. The role of the Anti-Corruption

Commission in this exercise is not stated. It is important that the Commission should have access to the declarations, as part of the material on the basis of which to implement the unexplained wealth provision. It should be observed that the list in article 241(2), while lengthy, is not comprehensive. It is therefore positive that scope for extension of the list is given to the legislature, through clause 241(2)(q)

As was the case with the Prevention of Corruption Order, the use of unexplained wealth as presumptive evidence of corruption is confined to public officers. It has no application to other persons who may also come into possession of wealth that cannot be related to known income. There does not seem to be any reason to perpetuate this distinction, in view of the acknowledgement, implicit in the wider range of activities to be criminalised, that corruption also afflicts the private sector. There is no basis for assuming that only public officers receive bribes. The Commission may not be able to rely on asset declarations made to the Integrity Commission in the case of private sector functionaries, but that is no reason for excluding them from the provisions of clause 34. Other sources of information on unexplained wealth can be used, such as the Deeds Registry, Companies registry and the financial intelligence unit (if one is established).

It is envisaged that the Commission will complement the revenue collecting capacity of government, by investigating violations of fiscal and revenue laws. For this purpose, the Commission has to have access to financial information, some of which may be protected by banking confidentiality. Clause 12 - on special investigation powers - appears to be adequate for the purpose of overriding banking confidentiality. Our inquiries revealed that during its tenure, the previous Anti-Corruption Commission never invoked the illicit enrichment provision in the Order.

5.9.3 Acts of corruption relating to an official of a foreign state.

This prohibition emanates from the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development (OECD) on 21 November 1997. The position in the SADC Protocol, AU Convention and UN Convention is as follows:

SADC Protocol

These acts of corruption are covered by Article 6 of the SADC Protocol and are subject to each State Party's domestic laws. Article 6(1) of the Protocol requires that each State Party must prohibit and punish the offering or granting, directly or indirectly, to an official of a foreign State of any article or monetary value, or other benefit, such as a gift, favour, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions. This prohibition applies to each State party's own nationals, persons having their habitual residence in its territory, and any businesses domiciled there.

AU Convention

The AU Convention does not contain a similar provision.

UN Convention

Article 16 of the UN Convention contains a similar prohibition.

5.9.4 Position of Bill regarding Acts of Corruption by official of foreign state

The Bill makes no reference to acts of corruption by officials of foreign states. It is recommended that this gap in the Bill be addressed.

Chapter 6: Field Research observations

The following field research observations emanated from in-depth interviews with leaders in government, business and civil society from 16-20 May 2005. They consolidate impressions gained from the interviews. These observations have in turn informed the recommendations set out in Chapter 7.

For a full list of individuals interviewed see Annex A. Please note that no comments have been attributed to specific individuals.

6.1 Background & the Bill

- Corruption, although relatively small in volume (compared with South Africa for example) has a large impact on Swaziland given its relative size.
- The Anti-Corruption Commission has been dysfunctional for the past two years.
- The issue became a priority for the new government in April/May 2004.
- The Bill was drafted in consultation with Anti-Corruption Commission and covers all main forms of corruption prevalent in Swaziland.
- The Draft Bill is based on regional good practice including recent legislation emanating from South Africa, Botswana and Namibia.
- The Bill is to be harmonised with Constitution Bill (now before Parliament).

6.2 Forms of corruption & high-risk areas

- Corruption harms the poor the most in Swaziland and has permeated all sections of society.
- It is imperative that corruption is combated to preserve certain key institutions – the manner in which the royal household is perceived as 'a blanket' of immunity for a large network of individuals alleged to be involved in corruption is concerning. This has the potential to impact on the integrity of the Monarchy – needs to be addressed.
- Procurement (Price inflation and collusion between domestic or foreign companies and local officials) is of concern. Procurement reform needs to be pushed through including a focus on the Central Tender Board (CTB), which is perceived to be vulnerable to corrupt activity. A further recommendation is that in order to avoid the inflation of prices and collusion in public procurement, it would be useful to issue an annual procurement pricing guideline for goods and services.

- 'Fronting' may be an issue of concern. The fact that journalists are frequently denied access to Deeds Registry (despite paying required E10) raises suspicion. It is also suspected that certain companies awarded tenders may be owned by public officials (conflict of interest).
- Executive orders provide a context in which senior officials are dragged into misuse of state funds/corruption (either willingly or unwillingly). An example cited was the failed attempt to purchase a jet for the King.
- It is alleged that a corrupt syndicate is at work in the Department of Public Works.
- Due to the Kingdom's high-unemployment rate monetary and/or sex bribes are extorted in return for employment opportunities.
- Bribery by foreign companies is a concern (they collude with local officials). This damages the Swazi economy and domestic private sector growth.
- Need to tip-off foreign governments (RSA/OECD) who have criminalised the payment of bribes abroad by domestic companies.
- Corruption has permeated parts of the private sector and SME's in particular.
- The King's Birthday is one event that is often abused by companies who overcharge or do not perform.

6.3 Political will

- Opinions generally expressed were that key office-holders such as the office of the Prime Minister and Minister of Justice have exemplified political will in Swaziland, however concern was expressed that this commitment might not be universal.
- The redrafting of the constitution is key – and a concern was raised that this process should see an overhaul of the governance structure.
- An atmosphere of fear continues to permeate society and this includes the fear of reprisals when fingering corruption involving the Royal Household. This is not conducive to nurturing political will to combat corruption.
- There is concern that the Monarch is the *de facto* 'Executive President' - creating parallel governance structure and thereby limiting the potential to effectively combat corruption in Swaziland.
- The current government has been slow in addressing some issues – but has also inherited a number of problems.

- The Auditor-General has made a number of complaints about recommendations made to the Public Accounts Committee (PAC) not being implemented by Controlling Officers. They need to respect the institution of Parliament and the recommendations of the Auditor-General.

6.4 Reporting corruption

- Informants and the media are sources of tip-offs for the Anti-Corruption Commission. There role in this needs to be recognised
- The Auditor-General has identified high-risk areas in the past. Better coordination/ communication between the AG's office and the Anti-Corruption Commission would increase the flow of such information.

6.5 The Commission:

6.5.1 Appointment & Removal of the Commissioner

- A non-Swazi national is favoured in the initial term.
- A term of office of 5-7 years, renewable for one term is proposed. This allows 2 years for a start-up and five years to build institution with the requisite capacity and political will.
- It was strongly felt that Parliament should appoint the Commissioner and only have power to remove him/her on very specific grounds linked to non-performance.
- The issue of 'misbehaviour', as a reason to remove the Commissioner is too broad – this needs to be defined in law to protect the Commission from external interference.
- The King should not be involved in the selection of the Commissioner – and should only be able to veto his/her appointment on very specific grounds.
- Investigators who raise corruption issue need to be protected by the Commission, a weakness in the police is that they are sometimes 'moved out' to rural areas after exposing controversial/political crimes.

6.5.2 Location & Co-ordination

- The ACC requires a level of autonomy – it can only be located under the Minister of Justice if Parliament is completely independent and accountable to the electorate and judiciary.
- Alternately its autonomy should be protected by the Constitution. It should be treated in the same was as High Court Judges in order to ensure that it can act without 'fear or favour'.
- A Parliamentary select committee could be established to review its performance, budgetary needs and expenditure on an annual basis.
- No state Anti-Corruption strategy exists at present, only *ad hoc* arrangements. This should be addressed to ensure that there is a co-ordinated government strategy to deal with corruption in the public and private sector.
- Guidelines/regulations for co-ordination/consultation are required (not a law). The latter may compromise the Anti-Corruption Commission – negatively affecting its independence.
- Agencies to be involved include the Anti-Corruption Commission, Police, Auditor-General, proposed Commission on Human Rights & Public Administration, Ministry of Justice and the Revenue Authority.
- There needs to be clear coordination between the ACC and the Police Fraud Department to ensure that there is not overlap in prosecuting white-collar crime.
- The ACC needs new premises (the current premises are rented and in a state of severe disrepair). It should be housed in its own building, preferably not in close proximity to other government institutions. Officers should not rub shoulders with officials from unconnected departments on a daily basis.
- The Constitution makes provision for *Commission on Human Rights & Public Administration* (Ombudsperson/Public Protector in other jurisdictions). It has a responsibility to investigate a number of areas of misconduct (including corruption) in the public service. There is a need for some co-ordination between the *Commission on Human Rights & Public Administration* and the ACC to ensure that they avoid duplicating investigations (resource efficiency). The *Commission on Human Rights & Public Administration* needs to also identify priority areas for engagement by the ACC.

6.6 Immunity

- No one should be immune to prosecution for corrupt practices in Swaziland. The status quo may be abused by the corrupt that seek protection from association with the monarchy.
- This would be a way of the King, as leader of the Swazi people, to signal that corruption will not be tolerated. It will also reaffirm the Kings commitment to personal integrity and set a very positive example for the rest of the nation.

6.7 Funding & Resources

- The ACC should be able to raise funds through the forfeiture of the proceeds of crime. This should supplement the proposed allocation by Parliament through the Ministry of Justice.
- One of the risks in an over-reliance in external funding is that it may give donors political ownership and not the Swazi people. However the ACC may need some core funding from abroad (ODA) during set-up, i.e. for building, purchase of vehicles, office equipment etc.
- Training of staff is essential: Members of the ACC need better understanding of what Corruption is about – develop specialised skills. Capacity Building must be budgeted for and officials seconded to institutions in the region for training (i.e. the DCEC in Botswana and the AFU/Scorpions/SIU in South Africa).
- The salaries of members of the commission must be set separately – not equivalent to public service employees. They need to be well paid in order to attract and retain skilled staff who are not vulnerable to corruption.
- Staff should be not seconded to or from ACC; this may inhibit investigators from acting decisively in tricky situations and limit ACC's long-term institutional capacity. The ACC needs to procure its own full-time expertise and can outsource some functions i.e. complex forensic auditing if necessary.
- The ACC needs its own building –separate from other government offices, with adequate security for storing records.

6.8 Accountability & Reporting (checks and balances)

- The MoJ reports to Parliament on behalf of the ACC, this is standard practice in the Kingdom – similar with the Auditor-General whose reports are tabled by the Ministry of Finance.
- The MPs raise questions with the Minister who raises these with the ACC.
- There is a practical difficulty of who can address Parliament – Changing this "may be a viable option". In the past it has been Parliament that has rejected this idea. Problem may have been manner in which the issue was raised with them. It could be seen as a tool to empower them.
- There appears to be little faith in the portfolio committee system as it is seen as ineffective.
- Creating capacity within Portfolio Committee's would be key – giving them the tools with which to engage the ACC effectively.
- The current annual turnover of Portfolio Committee members may also be too high.
- The ACC should be accountable to Parliament (possibly through a special select committee).
- The Commissioner shall be required to report, on an annual basis, to Parliament or to a select committee delegated authority by Parliament.
- Capacity is needed amongst MP's to interrogate the Commissioner.

6.9 Unexplained wealth

- A good framework is provided by the Public Sector Regulations (1978) but it must be enforced. It also requires a review of the effectiveness of the public service regulations governing the disclosure of assets and interests.
- Under the current system the PS's; HoD's; CEO of Parastatals, Ministers and MP's are required to declare assets annually. These provisions would be useful when utilising the unexplained wealth clause.
- This clause in the legislation also is extended to include the private sector in future.
- The current unexplained wealth provisions were allegedly never implemented because those implicated are close to the King.

6.10 Prosecution

- Where the DPP is appointed by the Head of state – and is ultimately accountable to him, the ACC should enjoy autonomy in deciding on prosecutions. In this case the DPP would act as a 'traffic light', reviewing proposed prosecutions and making recommendations to proceed to prosecute.
- Where the DPP is appointed by the Executive Head – and is ultimately accountable to him, and if the ACC enjoys autonomy – then the power of investigation and prosecution should be with the ACC. In this case the DPP would act as a 'traffic light', reviewing proposed prosecutions and making recommendations to proceed to prosecute.
- A specialised prosecution unit (with adequate training should be set up), either in ACC or DPP. This could better dispose of cases (they should be able to take cases to court and not rely on DPP).
- Prosecution is long and tedious and as corruption is a bailable offence it is often not prioritised by the prosecution service (awaiting trial prisoners receive priority).
- Possibility of specialised courts or dedicated court time to deal with corruption cases and white-collar crime including fraud should be investigated.
- Corruption cases should be dealt with at both the High and Lower courts.
- There is a need to deal with the public perception that corruption cases are settled out of court and not prosecuted.
- The ACC may have been leaned on not to pursue prosecution of some high-profile cases. Currently some investigations by various agencies may be compromised by members of the household calling with a request to cancel these (often without consent or knowledge of the Monarch). This needs to be avoided in future.

6.11 Raising Awareness

- In order to raise awareness of corruption beyond the two main urban centres, the prevention/awareness unit within the ACC has to be adequately resourced (staff, vehicles, training). The DCEC (Botswana may provide a good model in this regard.
- In the long-term an additional office might be needed elsewhere in the country to ensure that the ACC has sufficient reach across the Kingdom.

- An annual dialogue (*imbizo*) should be organised between Civil Society and the ACC. This would allow for feedback from CSO's on corruption in particular areas of the country (priorities) and provide ACC feedback mechanism on its progress.

6.12 Additional Matters

6.12.1 Public Sector Reform:

There is a need for public sector reform programme, specifically to dismantle the structure of entrenched officials who have occupied office for lengthy periods of time (and abused this position). Performance contracts also need to be introduced.

6.12.2 Research:

No study exists on the nature and extent of corruption in Swaziland. This should be addressed by civil society/academia to provide a baseline for future measurement of the impact of the ACC.

6.12.3 Auditor General:

The AG's office needs to be guaranteed independence in terms of the Constitution – and not be accountable to the Ministry of Finance. It needs to be accountable to Parliament and be allocated a budget directly by Parliament (on the advice of the PAC). The Draft Constitution does not guarantee its independence.

- The Auditor General's office needs resources to place officials in various departments and not only at head office. Training for officials is still a major challenge. The office appears to be severely constrained by funding capacity, which impacts on its ability to function.
- The Auditor General's office needs to be able to audit all aspects of defence procurement, including the purchase of military hardware.
- The Public Accounts Committee needs to monitor the implementation of its recommendations by the Controlling Officers. There is a need for much stiffer sanctions for non-compliance, including a requirement for Ministers to be held to account by the PAC if necessary. This points to need for greater respect for the institution of Parliament by Controlling Officers.

- It is necessary to train members of the judiciary on what constitutes corruption – and on all aspects of the new Act to ensure that they can implement its provisions.

6.12.4 Gifts:

Comprehensive regulations exist to regulate the receipt of gifts by members of the Public Service as well as loans of money and other financial transactions[13]. There is a need to review effectiveness of provision and enforcement thereof (as well as awareness amongst members of the Public Service).

6.12.5 Assets & Conflict of interest:

A Comprehensive set of regulations exists that govern conflict of interests, however it is unclear if this covers all levels of officials [14](i.e. HOD's; PS's; MP's, Members of Senate; Cabinet members etc.). There is a need to review effectiveness of provision and enforcement thereof (as well as awareness amongst members of the Public Service) – as well as application of sanctions mechanisms. Clarification is needed if a register of assets and interests exists and where this is housed and who has access to it – this would be a useful addition.

6.12.6 Supporting legislation

- The **Constitution** does not adequately address the separation of powers. An example of this is that King retains the power to appoint key individuals and to issue 'royal commands' some of which have fiscal implications.
- A soft law (Code) or Act of Parliament is required to promote **accountability of Civil Society Organisations** to ensure that NGO's practice internal good governance (i.e. appointment of a board, reporting, accountability to donors etc). Need to look at good practice in the region (not the Zimbabwe model).
- **Access to Information** and **Whistle-blowing** legislation have not been prioritised by the Ministry of Justice. There is a need to create an enabling environment for whistle-blowing and access to information.

[13] Public Service Regulation – Part 10
[14] Public Service Regulation – Part 10

- The current *Official Secrecy Act (1968)* and *Books and Newspapers Act (1963)* are perceived to be instruments that limit public access to information.
- Concern that the *Privacy Protection Bill* may further inhibit access to information.
- Citizens need to have access to National Budget – and a breakdown of what expenses are allocated for.
- There is a need for enabling environment to be created for whistleblowers including the promulgation of laws to protect those who blow the whistle on corrupt practice or abuse of office in the workplace. The ACC needs to have an official mechanism to receive public complaints. This should be through the receipt of written petitions (hand delivered, post or electronic), meetings with complainants/whistleblowers at the office of the ACC or through the establishment of a dedicated hotline for reporting corruption in the public and private sector (this should preferably be a toll-free number to ensure use by a broader reach of the population).

6.12.7 Procurement reform:

In seeking to address this, government needs to take into account the Register for Tender Defaulters etc. (Treasury needs to be made aware of its responsibility in terms of the Bill.)

- All public procurement over a threshold (currently E5,000) needs to be approved by the Central Tender Board (CTB) or equivalent new body. It was noted that the office of the King is currently excluded from this requirement. The recommendation is that, to check opportunistic corruption involving officials working through that office, the King's office should not be exempted from the oversight of the CTB.
- The ACC or Auditor-General should undertake assessment of implementation of new procurement framework after it has been implemented to ensure that AC measures have been enforced.

Chapter 7: Recommendations

The study accordingly makes the following recommendations:

A. In general:

1. The political will and commitment to combating corruption should be reflected at all levels to ensure a sustained and comprehensive response to corruption.
2. Immunity from prosecution for corrupt practices should not be allowed at any level. The law against corruption must be equally applied and enforced across the board.
3. The Constitution should guarantee the rule of law, and support a culture of democratic constitutionalism, as imbued in the separation of powers and the respect for judicial authority

B. To the government of the Kingdom of Swaziland:

1. Swaziland should formulate a national anti-corruption strategy, co-ordinated by government and involving all stakeholders, as a matter of urgency. The strategy should be comprehensive enough to deal with corruption in the public and private sector.
2. The Prevention of Corruption Bill should be harmonised with the Draft Constitution. In particular, the powers and functions of the proposed Commission *on Human Rights & Public Administration* should be harmonised with those of the Anti-Corruption Commission to avoid duplication of activities. The *Commission on Human Rights & Public Administration* needs to also identify priority areas for engagement by the Anti-Corruption Commission.
3. There should be comprehensive procurement reform across all sectors within the public service. This should be publicised to the general public and the private sector.
4. There should be clear co-ordination of activities between the Anti-Corruption Commission and the Police Fraud Department to ensure that there is no overlap in investigating and prosecuting white-collar crime, including corruption.
5. The Anti-Corruption Commission should be able to raise funds through the forfeiture of the proceeds of crime. This should supplement the proposed allocation by Parliament through the Ministry of Justice. The Commission may also need

some core funding from abroad during its set-up, i.e. for building, purchase of vehicles, office equipment etc.

6. Training of staff and capacity building are essential. Investigators, prosecutors and the judiciary should be trained on measures to combat corruption – and on all aspects of the new Act to ensure that they can implement its provisions.
7. The salaries of members of the commission should be set separately – and not necessarily linked to public service employee scales. They need to be well paid in order to attract and retain skilled staff who are not vulnerable to corruption.
8. Staff should not be seconded to or from the Commission, as this may inhibit investigators from acting decisively in tricky situations and limit its long-term institutional capacity. The Commission needs to procure its own full-time expertise and can outsource some functions i.e. complex forensic auditing if necessary.
9. The regulations requiring the annual disclosure of assets, interest and liabilities should be reviewed to ensure effective enforcement.
10. The Anti-Corruption Commission should be adequately resourced.
11. Government, in consultation with civil society and the Swazi academic community, should commission regular surveys of the nature and extent of corruption in Swaziland, to facilitate periodical measurement of the impact of the Anti-Corruption Commission.
12. The Auditor General's office should be strengthened and guaranteed independence in terms of the Constitution. It should be accountable to Parliament.
13. Legislation on access to information as well as legal guarantees on the protection of whistle blowers must be instituted as a matter of priority.
14. The Anti-Corruption Commission should be housed in its own building, preferably not in close proximity to other government institutions.
15. Government should institute public sector reform measures to rationalize processes and procedures, and to restructure organizational work and methods.

C. To parliament:

1. Legislation on access to information as well as legal guarantees on the protection of whistle blowers must be instituted as a matter of priority.
2. The role of the media in investigating and reporting on corruption needs to be recognised by law and effectively protected by the Constitution.

3. The powers for appointment and removal of the Anti-Corruption Commissioner should exclusively be vested with Parliament, and the extension of veto powers to the King with regard to the tenure of the Commissioner should be precluded. The same arrangements should be extended to the tenure of the Deputy Commissioner.
4. The Anti-Corruption Commission (ACC) should be accountable and answerable to Parliament in all matters relating to its operations to ensure transparency in the discharge of its mandate.
5. To insulate the tenure of both the Commissioner and the Deputy Commissioner from external interference, the grounds for their appointment and removal must be specified in law. Parliament should be able to remove the Commissioner and the Deputy Commissioner from office only on the grounds of non-performance or clearly defined and relevant 'misbehaviour'. The current provision in the Bill relating to removal for misbehaviour is too broad.
6. The Anti-Corruption Commission should be autonomous; it should not be located within a government ministry. Corruption investigators should be protected by law from victimisation.
7. Capacity should be created within the parliamentary portfolio committee system – to enable parliament to effectively hold the ACC accountable

D. To the judiciary:

1. There should be specialised courts to deal with corruption cases. Before the establishment of such courts, corruption cases should be dealt with by both the High and Lower courts.

E. To civil society:

1. An annual dialogue (*imbizo*) should be organised between Civil Society and the Anti-Corruption Commission, to facilitate interaction.

Annex A:

The following table lists some of the individuals consulted or interviewed during the course of this research:

Institution/Organisation	Designation	Name
Anti-Corruption Commission	Director	Mr. C.S. Lukhele
Anti-Corruption Commission	Acting Commissioner	Mr. O'Connor
Attorney General's Chambers	Deputy Attorney General	Mr. M.R. Fakudze
Auditor-Generals Office	Auditor-General	Mr. Robert Dlamini
Auditor-Generals Office	Deputy Auditor-General	Mr. Dlamini
Business	-	Mr. Walter Bennett
Co-ordinating Assembly of NGO's	Director	Mr. Emmanuel Ndlangamandla
Directorate of Public Prosecutions	Deputy Director of Public Prosecutions	Ms. Mumsy Dlamini
Law Society of Swaziland	Vice-President	Mr. Nkululeko Hlope
Ministry of Finance	Acting Principal Secretary	Mr. Victor Nxumalo
Ministry of Justice & Constitutional Affairs	Principal Secretary	Mr. Sicelo Dlamini
Ministry of Justice & Constitutional Affairs	Under Secretary	Mr. Siboniso Masilela
Ministry of Justice & Constitutional Affairs	Senior Parliamentary Counsel	Ms. Gcinaphi Mndzebele
Open Society Institute of Southern Africa	Representative	Mr. Musi Masuku
Royal Swazi Police	Deputy Commissioner	Ms. Lydia Dlamini
Royal Swazi Police	Assistant Commissioner	Mr. Ndlangamandla
Royal Swazi Police	Commissioner	Mr. Sithole
Royal Swazi Police		Mr. Motasa
Swaziland Coalition of Concerned Civil Organisations	Coordinator	Mr. Musa Hlope
Times of Swaziland	Editor	Mr. Martin Dlamini
United Nations Development Programme		Mr. Sissay

In addition the assessment team also briefed the following individuals on its activities:

- H.E. A.T. Dlamini, Prime Minister of the Kingdom of Swaziland
- H.E. Prince David Dlamini, Minister of Justice and Constitutional Development of the Kingdom of Swaziland
- H.E. Amb. Louis Lucke, Ambassodor of the United States of America to the Kingdom of Swaziland

Note: Copies of legislation, and the judgment in **Rex vs. Mandla Ablon Dlamini** (Case no. 7/2002) were received from the Chief Legislative Draftsman in the Attorney General's Office, Mr Sabelo Matsebula.